

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on June 20, 2016, and June 21, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age ___ and in grade ____.³ He is child with a disability pursuant to the IDEA who receives special education and related services under the disability classification of autism. The student attends a public charter school located in the District of Columbia (“School A”) for which the District of Columbia Public Schools (“DCPS”) serves as the local education agency (“LEA”) for purposes of special education.

On April 19, 2016, the student’s parents (“Petitioners”) filed a due process complaint alleging that DCPS denied the student a free appropriate public education (“FAPE”) by, inter alia, failing to provide the student specialized instruction and related services at School A that was prescribed by his individualized educational program (“IEP”) and failing to comply with a May 19, 2015, Hearing Officer’s Determination (“HOD”) requiring the student be offered an appropriate IEP and educational placement for school year (“SY”) 2015-2016. Petitioners seek as relief that the Hearing Officer find that DCPS denied the student a FAPE and order DCPS to place the student at a non-public special education school and award of compensatory education.

On May 4, 2016, DCPS filed a timely response to the Petitioners’ complaint in which it denies that it failed to provide the student with a FAPE. DCPS contends that the May 19, 2015, HOD ordered the student’s IEP be amended to prescribe 15 hours of specialized instruction outside of general education, granted Petitioner an independent psycho-educational evaluation and ordered that the IEP team meet to review that evaluation and formulate an appropriate program and placement for the student for SY 2015-2016. DCPS contends, inter alia, that it complied with the HOD and in September 2015 DCPS notified Petitioners of the school location where the student’s IEP would be implemented for SY 2015-2016. DCPS asserts Petitioners did not enroll the student at the school location offered and has voluntarily chosen for the student to remain at School A.

The parties participated in a resolution meeting on May 3, 2016, and did not reach an agreement that resolved the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on May 19, 2016, and originally ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on July 3, 2016. At the conclusion of the hearing Petitioners’ counsel requested leave to file written closing arguments and submitted a motion to extend the HOD due date to allow for written closing arguments. The motion was unopposed and granted and the HOD due date was extended to July 10, 2016.

³ The student’s current age and grade are in indicated in Appendix B.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on May 16, 2016, and issued a draft pre-hearing order (“PHO”) on May 19, 2016. A second pre-hearing conference was convened on June 10, 2016, and on June 12, 2016, a final PHO was issued outlining, inter alia, the issues to be adjudicated.

ISSUES: ⁴

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student in May 2015 and/or August 2015 because DCPS; a. failed to discuss, determine and indicate the student’s least restrictive environment (“LRE”) and placement along the continuum of alternative placements; b. failed to discuss and determine placement at the August 2015 meeting; c. delegated the placement and LRE to a team that did not include Petitioners or individuals knowledgeable about the student; d. limited the student’s disability classification to autism at the August 2015 meeting, depriving the Petitioners of meaningful input in the decision making process.
2. Whether DCPS denied the student a FAPE by failing to offer the student a placement in a program that could provide a FAPE for SY 2015-2016.
3. Whether DCPS denied the student a FAPE by failing to formulate an appropriate program and placement for the student for SY 2015-2016, in compliance with the May 19, 2015, HOD.
4. Whether DCPS denied the student a FAPE by failing to issue a prior written notice placing the student in an appropriate program for SY 2015-2016, depriving Petitioners of the ability to meaningfully participate in the decision making process.
5. Whether DCPS denied the student a FAPE by failing to provide the specialized instruction and related services on the student’s May 2015 amended IEP and the August 2015 IEP during SY 2015-2016.
6. Whether DCPS denied the student a FAPE by failing to timely convene a MTD meeting and timely review the student’s independent psychological evaluation that was provided to DCPS in December 2015 and reviewed on March 15, 2015.
7. Whether DCPS denied the student a FAPE by failing to convene an IEP/MDT meeting to review and revise the student’s IEP based upon the October 2015 independent psychological evaluation. ⁵

⁴ The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁵ Although the independent evaluation was reviewed at an eligibility meeting on March 15, 2015, Petitioner asserts that there has been no IEP meeting and the IEP has not been revised.

8. Whether DCPS denied the student a FAPE by failing to discuss and determine whether the student required, and conduct, an updated speech/language evaluation, functional behavioral assessment and behavior intervention plan as recommended by the DCPS psychologist.⁶

9. Whether DCPS denied the student a FAPE by failing to timely conduct an Assistive Technology (“AT”) evaluation as recommended by the October 2015 psychological evaluation.⁷

10. Whether DCPS denied the student a FAPE by failing to provide a copy of the draft IEP and other documents to be discussed at the April 13, 2016, meeting to Petitioners within 5 business days prior to the meeting.⁸

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1 through 61 and Respondent’s Exhibits 1 through 12) that were admitted into the record and are listed in Appendix A. Witnesses’ identifying information is listed in Appendix B. The record in this matter was closed with the filing of written closing arguments by the Respondent on June 24, 2016, and by Petitioner on June 28, 2016.

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by preponderance of the evidence on some of the issues, but not all, and the Hearing Officer determined that the student was denied a FAPE by DCPS, inter alia, failing to implement the student’s IEP during SY 2015-2016.

As relief for the denial(s) of FAPE determined, the Hearing Officer grants Petitioner as compensatory education the student’s placement with DCPS funding for SY 2016-2017 at the non-public school requested by Petitioner along with credit recovery courses and independent tutoring to assist the student in completing the credit recovery courses.

⁶ Petitioner asserts the speech and language evaluation has been completed and reviewed but the FBA and BIP have not.

⁷ Petitioner acknowledged that the AT evaluation has now been completed but was not at the time the complaint was filed.

⁸ The April 13, 2016, meeting was scheduled but was not held.

FINDINGS OF FACT:⁹

1. The student is a special education student who receives special education and related services pursuant to the IDEA under the disability classification of autism. The student attends School A, a public charter school for which DCPS serves as the LEA for purposes of special education. Petitioners enrolled the student at School A in July 2014 for SY 2014-2015. (Respondent's Exhibit 5-1, Witness 5's testimony)
2. Petitioner's filed a due process complaint against DCPS as the LEA for School A on February 3, 2015, that resulted in a HOD issued May 19, 2015. The HOD concluded DCPS denied the student a FAPE by, inter alia, providing the student an October 2014, IEP with an inadequate amount of specialized instruction. The HOD ordered, among other things, that the student receive 15 hours of specialized instruction outside general education and the Hearing Officer placed those hours of instruction in the student's IEP by the order. The HOD also directed that the student receive a psychoeducational assessment and that within 30 days of completion of that assessment an IEP meeting be convened to review the results of the assessment and all other current assessments of the student and formulate an appropriate program and placement for the student for SY 2015-2016. (Respondent's Exhibit 2-1, 2-3, 2-16, 2-18)
3. In compliance with the HOD DCPS amended the student's IEP on May 20, 2015, to include 15 hours of specialized instruction outside general education. (Respondent's Exhibit 3-1, 3-11, 3-12)
4. DCPS completed the psycho-educational evaluation ordered by the May 19, 2015, HOD and on August 26, 2015, DCPS convened an IEP meeting at School A where the evaluation was reviewed. The student's father participated in the meeting along with his counsel. The team initially discussed and determined the student met the criteria for speech language impairment ("SLI") and other health impairment ("OHI") but ultimately determined the student's primary disability was autism and autism is listed as the student's disability classification on the cover page of the IEP. However, the student's IEP goals and services and accommodations addressed the student's deficits that were in the other disability classifications considered including the student's speech language deficits. (Respondent's Exhibit 5-1, 5-2, Petitioner's Exhibit 24-2, 25-1, Witness 4's testimony, Witness 5's testimony)
5. At the August 26, 2015, meeting the team maintained the student's level of specialized instruction at 15 hours outside general education. The team discussed the student's placement for 2015-2016 and agreed that once the student's IEP was finalized it will be sent to the DCPS location of services ("LOS") team "for a review and determination of an appropriate program and placement" for SY 2015-2016. The meeting notes state "Once a determination for an appropriate program and placement is made team can hold a meeting to present the new LOS" (Petitioner's Exhibits 23-11, 24-2)

⁹ The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

6. The student's IEP was continued in draft form following the August 26, 2015, meeting to allow for among other things for the student's parent to review the IEP and make any suggestions for changes. (Witness 4's testimony)
7. Despite what the fact that the August 26, 2015, meeting notes stated that a meeting would be convened to present the student's LOS for SY 2015-2016, no meeting was convened for that purpose, and on September 15, 2016, and September 24, 2015, DCPS sent Petitioners' counsel a copy of what was described as a finalized IEP (dated August 26, 2015) by email and in that email notified that the student's IEP could be implemented a DCPS [REDACTED] school ("School B"). (Respondent's Exhibits 5-1, 6-1, Petitioner's Exhibit 46-1)
8. DCPS did not issue a prior written notice to Petitioners indicating the student's location of services was School B at anytime prior to the current due process complaint being filed. (Father's testimony)
9. Because Petitioners expressed concern that the psychoeducational evaluation that DCPS had conducted and reviewed was not a comprehensive evaluation, Petitioner requested and was granted authorization for funding of an independent psychological evaluation. That evaluation was completed on October 7, 2015. The student was performing below grade level across academic areas. The independent psychological evaluation recommended, among other things, that the student be placed in a full-time out of general education program designed to support students with language disorders and autism, that he receive an AT evaluation. (Father's testimony, Witness 3's testimony, Petitioner's Exhibit 3-1, 3-11)
10. Petitioners did not enroll the student at School B because they believed the student's IEP had not yet been completed for a school location to be determined due to the pending independent evaluation and because there had been no formal meeting where School B was discussed and the student's LOS determined and there had been no formal written notice to Petitioner that School B was the student's LOS. As a result, Petitioner kept the student at School A. (Father's testimony)
11. The student remained at School A and the specialized instruction outside general education prescribed by the student's May 20, 2015, IEP and the proposed IEP discussed at the August 26, 2015, IEP meeting was not implemented at School A, as School A does not provide any specialized instruction outside general education. (Witness 4's testimony)
12. Petitioners' independent comprehensive psychological evaluation report was provided to DCPS on December 22, 2015. Petitioners were asked for possible meeting dates. On January 14, 2016, Petitioners responded by requesting a meeting on January 20th or 21st, 2016, and DCPS offered January 26th or February 2nd for the meeting. Because of scheduling difficulties on the part of both Petitioners and school staff the meeting was not confirmed and held until March 15, 2015. (Petitioner's Exhibit 45-4, 45-5, 45-6, 45-7, 45-8)
13. On March 15, 2016, the independent psycho-educational evaluation was reviewed and

the team made an eligibility determination for the student of multiple disabilities including autism and OHI for Attention Deficit Hyperactivity Disorder (“ADHD”). However, the student’s IEP was not finalized at that meeting, as there were other evaluations that needed to be conducted. The School A team, however, did not agree with the recommendation that the student was in need of a full-time out of general education IEP and placement as the specialized instruction outside general education that was already in his IEP had not yet been implemented. (Respondent’s Exhibit 7-1, Petitioner’s Exhibit 3-11, Witness 4’s testimony)

14. In April 2016 DCPS conducted an assistive technology evaluation and a speech/language evaluation. (Petitioner’s Exhibits 1, 2)
15. School A scheduled an IEP meeting for the student for April 13, 2016, to review evaluations and data and complete the student’s IEP. As of April 12, 2016, School A had not provided Petitioners a copy of the draft IEP that was to be discussed at the April 13, 2016, meeting. As a result the student’s IEP meeting was not convened on April 13, 2016, as scheduled. (Petitioner’s Exhibit 45-1, 45-2)
16. On April 14, 2016, DCPS prepared a draft IEP but a meeting had not been held to consider evaluation data and to complete the student’s IEP when the current due process complaint was filed on April 19, 2016. (Respondent’s Exhibit 8)
17. DCPS was prepared and attempted to review the student’s speech language evaluation and an AT evaluation and review the student’s draft IEP at the resolution meeting on the due process complaint. However, Petitioner did want to proceed with that discussion at the resolution meeting and it was agreed that an IEP meeting would be convened on May 17, 2016. (Respondent’s Exhibit 9, Witness 4’s testimony)
18. Since the August 26, 2015, meeting and during the time that additional evaluations have been conducted and reviewed following that meeting, the student’s May 20, 2015, IEP has remained in effect. On May 17, 2016, DCPS issued a prior written notice stating that the student’s current IEP with 15 hours of specialized instruction outside general education would be implemented at School B. DCPS believes that one final meeting to incorporate the results of the student’s AT evaluation is the only matter outstanding for the student’s IEP to be updated and finalized. (Witness 5’s testimony, Respondent’s Exhibit 10)
19. As a result of the student’s specialized instruction outside general education not being provided to him at School A the student has continued to struggle at School A and has performed poorly academically. (Witness 4’s testimony)
20. The student is also struggling in social and emotional areas at School A because he was teased due to his delays and speech issues. (Father’s testimony)
21. The student has interviewed at and been accepted to a non-public special education school (“School C”) that provides services to students with autism and speech language disorders. School C has an OSSE certificate of approval and its tuition rates are set by OSSE. School C has licensed special educators and related services provides and can

provide the student the intense services he needs to make up his academic deficits and can provide the student credit recovery courses for any courses he has failed. The School C staff believes the student would benefit greatly from its program. (Witness 1's testimony, Petitioner's Exhibit 57)

22. Petitioner engaged an educational consultant who observed the student in his classroom and opined that the student is in need of a full time out of general education placement and would benefit from credit recovery courses for the missed services the student has endured at School A and would also benefit from tutoring to assist him in completing those credit recovery courses. (Witness 2's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student in May 2015 and/or August 2015 because DCPS; a. failed to discuss, determine and indicate the student's LRE and placement along the continuum of alternative placement; b. failed to discuss and determine placement at the August 2015 meeting; c. delegated the

placement and LRE to a team that did not include Petitioners or individuals knowledgeable about the student; d. limited the student's disability classification to autism at the August 2015 meeting, depriving the Petitioners of meaningful input in the decision making process.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE with regard to the student's May 2015, IEP as that IEP was dictated by the May 19, 2015, HOD and based upon the evidence is the only IEP that is in effect for the student despite the continued meetings and draft IEPs that have been developed and discussed since the HOD was issued.

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

"[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *S.S. ex rel. Schank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)). An IEP "should be reasonably calculated to enable the

child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204. "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) ("the adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011)

IDEA requires that children with disabilities be placed in the least restrictive environment ("LRE") so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.") Further, an appropriate location of services under the IDEA is one that is capable of "substantially implementing" a Student's IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

The evidence demonstrates that DCPS amended the student's IEP as of May 20, 2015, as mandated by the May 19, 2015, HOD and the evidence demonstrates that despite the meeting held on August 26, 2015, the student's IEP was never completed. This position is supported not only by the student's father's testimony, but also by the DCPS witness 5's testimony and the belated issuance of a prior written notice after the complaint was filed that the student's May 20, 2015, IEP could be implemented at School B. Consequently, the Hearing Officer concludes that the IEP dated August 26, 2015, remained a draft IEP despite the email DCPS sent Petitioner's counsel with what purported to be a finalized IEP. Consequently, the Hearing Officer concludes that until DCPS has completed an IEP that was mandated to be reviewed and revised as result of new evaluations for the student, the only IEP the student has been in effect is the May 20, 2015, IEP. Because the Hearing Officer mandated that IEP through the HOD there was no requirement that DCPS, as to the May 20, 2015, IEP, discuss, determine and indicate the student's LRE and placement along the continuum of alternative placements. The student's placement was not delegated and the student's disability classification was not limited to autism at the August 2015 meeting. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to offer the student a placement in a program that could provide a FAPE for SY 2015-2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided the specialized instruction the student's IEP prescribes.

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “Savoy v. District of Columbia (DC Dist. Court) February 2012 adopted Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that despite the student's IEP that was mandated by the May 19, 2015, HOD and prescribed specialized instruction outside general education, School A has failed to implement that IEP. School A and thus DCPS continued to simply maintain that it does not provide such services and Petitioners should move their student to another school that does. Although DCPS attempted to inform Petitioners that a DCPS school could implement the student's IEP, DCPS failed to follow the procedural requirements including a prior written notice of a change in the student's location of services that the law requires. School A and/or DCPS could have taken action to provide the student outside general education instruction by some means, perhaps even reassigning staff, to comply with the student's IEP while the student's evaluations and IEP process continued. Instead it chose to simply continue to, for what amounted to a full school year, not implement the student's IEP. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to formulate an appropriate program and placement for the student for SY 2015-2016, in compliance with the May 19, 2015, HOD.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

The evidence demonstrates that despite the May 20, 2015, HOD's mandate that DCPS conduct an evaluation of the student and determine an appropriate program and placement for the student, the completion of this mandate has not occurred because Petitioner disagreed with the DCPS evaluation that was ordered by the HOD and DCPS granted Petitioners an independent evaluation. As result of that independent evaluation and subsequent evaluations recommended and conducted, the finalization of an IEP and determination of an appropriate program for the

student has not been completed as the HOD directed. However, the delay in doing so can be attributed to both parties as result of not only subsequent evaluations but scheduling conflicts as well. Based on this evidence, the Hearing Officer cannot conclude that DCPS should be held liable for any non-compliance with the HOD.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to issue a prior written notice placing the student in an appropriate program for SY 2015-2016, depriving Petitioners of the ability to meaningfully participate in the decision making process.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

As alluded to above, pursuant to a recent law enacted in the District of Columbia whenever a student's location of services is changed the LEA is required to issue a prior written notice. As the evidence in this case demonstrates DCPS failed to issue a prior written notice changing the student's location of services for the student's May 20, 2015, IEP to be implemented prior to the due process complaint being filed. Had a prior notice been issued at the start of SY 2015-2016 Petitioner might have filed a due process complaint challenging DCPS' action far earlier resulting in a more prompt determination and resolution as to where the student's May 20, 2015, IEP could and would be implemented. The Hearing Officer concludes that DCPS' failure to issue a prior written notice prior to the complaint being filed significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to provide the specialized instruction and related services on the student's May 2015 amended IEP and the August 2015 IEP during SY 2015-2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

As discussed in issues #1 and #2 above, the Hearing Officer has concluded that the student's May 20, 2015, IEP was the only IEP in effect and was clearly not implemented at School A during SY 2015-2016. The evidence demonstrates that as result of the IEP not being implemented the student has continued to struggle academically and socially and has been denied a FAPE as result.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to timely convene a MTD meeting and timely review the student's independent psychological evaluation that was provided to DCPS in December 2015 and reviewed on March 15, 2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

The evidence demonstrates that DCPS was provided the student's independent evaluation in late December 2015 and that a meeting to review that evaluation was held on March 15, 2016. The evidence demonstrates that scheduling conflicts were attributable to both parties. Consequently,

the Hearing Officer cannot conclude that DCPS is liable for any inordinate delay in reviewing the student's independent evaluation.

ISSUE 7: Whether DCPS denied the student a FAPE by failing to convene an IEP/MDT meeting to review and revise the student's IEP based upon the October 2015 independent psychological evaluation.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

As discussed above the scheduling conflicts that resulted in the independent evaluation not being reviewed until March 15, 2015, were attributable to both parties. The student's IEP has still not been finalized because the next scheduled meeting that was to take place to update the student's IEP was never held because Petitioner chose not to attend the next scheduled meeting to finalize the student's IEP. Based on the evidence presented, the Hearing Officer cannot conclude that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

ISSUE 8: Whether DCPS denied the student a FAPE by failing to discuss and determine whether the student required, and conduct, an updated speech/language evaluation, functional behavioral assessment and behavior intervention plan as recommended by the DCPS psychologist.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

The evidence indicated that DCPS has conducted a speech language evaluation. There was no evidence presented as to the recommendation for the functional behavioral assessment or the behavior intervention plan recommended by a DCPS evaluation from which the Hearing Officer could conclude that a FBA or BIP was required and that the failure to conduct the such an evaluation resulted in a denial of FAPE to the student. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

ISSUE 9: Whether DCPS denied the student a FAPE by failing to timely conduct an Assistive Technology evaluation as recommended by the October 2015 psychological evaluation.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

The evidence demonstrates that DCPS conducted an AT evaluation of the student and that it has been reviewed and that a meeting needs to be held to incorporate recommendations in the student's IEP. Because the student's IEP meeting delays to review the subsequent evaluations can be attributable to both parties the Hearing Officer does not conclude that DCPS is liable for any delay in the evaluation not being conducted and/or reviewed.

ISSUE 10: Whether DCPS denied the student a FAPE by failing to provide a copy of the draft IEP and other documents to be discussed at the April 13, 2016, meeting to Petitioners within 5 business days prior to the meeting.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

An LEA is required to provide parents a copy of the draft IEP five days prior to an IEP meeting. The evidence indicates that as of the day prior to the student's scheduled April 13, 2016, IEP meeting Petitioners had not been provided a copy of the student's draft IEP. As result, the student's IEP meeting was not held. The Hearing Officer concludes based on this evidence that DCPS' failure to provide Petitioner's a copy of the student's draft IEP five days prior to the scheduled meeting impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was not provided the specialized instruction outside general that he was to be provided.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The Hearing Officer has concluded based on the evidence presented of the student's significant academic deficits and the fact that the student's IEP was not implemented for full year, and based upon the recommendation that the student would benefit from the services he can be provided at School C¹⁰, his placement in such a program for the next school year is a reasonable means of compensating him for the deprivation of services he has incurred during SY 2015-2016 while his IEP was not implemented, even though his IEP does not prescribe a full time out of general education program. Although Petitioner requested a significant amount of tutoring and credit recovery to compensate the student, the Hearing Officer was not convinced that level of

¹⁰ The Hearing Officer concludes that the evidence also demonstrates School C meets the requirements that the Hearing Officer is to consider under Branham for a student's prospective placement.

compensation requested was warranted. The Hearing Officer, based on the evidence, finds that it is reasonable to provide the student some credit recovery and tutoring to be used while he attending School C during SY 2016-2017 to make up for the loss he has incurred.

ORDER: ¹¹

1. As compensatory education for the violations and denials of FAPE determined herein, the Hearing Officer directs that DCPS shall place and fund the student at [REDACTED] for SY 2016-2017 and provide transportation services. In addition, DCPS shall authorize and fund two credit recovery courses at [REDACTED] to be provided after school and on weekends, at the rate [REDACTED] customarily charges DCPS for such courses. Finally, DCPS shall provide the student 50 hours of independent tutoring at the OSSE prescribed rate to support his completion of the credit recover courses.
2. Within twenty (20) school days after the student's has begun attending [REDACTED] for SY 2016-2017, DCPS shall review and revise the student's IEP to reflect the services and setting that the student will be provided while attending [REDACTED] for SY 2016-2017 with all services provided to the student outside general education.
3. DCPS shall, in no more than 90 days and no less that 30 days prior to the end of SY 2016-2017, convene a multidisciplinary team meeting to evaluate the student's academic and related services progress during his time at [REDACTED], review and revise the student's IEP as appropriate and make a determination regarding the student's least restrictive environment, educational placement and location of services for SY 2017-2018 and issue a prior notice of placement stating the determination(s) made by the team at that meeting.
4. All other requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: July 10, 2016

¹¹ Any delay in Respondent DCPS in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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